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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 229

FEDERAL TRADE COMMISSION, *Petitioner,*

vs.

JAMES F. CRAFTS, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Subject Index

	Page
Questions presented	1
Statement of case	2
Argument	6
There is no conflict of decision	8
Importance of the question	10
Conclusion	11

Table of Authorities Cited

Cases	Pages
Civil Aeronautics Board v. Hermann, 353 U.S. 322, reversing per curiam 237 F. 2d 359 (C.A. 9)	8
Endicott-Johnson Corp. v. Perkins, 317 U.S. 501	6, 7
Jones v. Securities and Exchange Commission, 298 U.S. 1	6
Maryland Casualty Co. v. Cushing, 347 U.S. 409	8
National Casualty Company v. Federal Trade Commission ..... F. 2d ..... decided June 6, 1957	10
North Little Rock Transportation Co. v. Casualty Reciprocal Exchange, 181 F. 2d 174	9
Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186	7
Prudential Insurance Co. v. Benjamin, 328 U.S. 408	8
United States v. Minker, 350 U.S. 179	6
United States v. Morton Salt Co., 338 U.S. 632	7
United States v. South-Eastern Underwriters Association, 328 U.S. 533	9
United States v. Sylvanus, 192 F. 2d 96	9
Wilburn Boat Co. v. Fireman's Fund Insurance Co., 348 U.S. 310	9

Statutes	
Administrative Procedure Act, Section 6(c) (60 Stat. 240, 5 U.S.C. 1005(c))	2; 7, 11
Public Law 15, 79th Congress (59 Stat. 33, 15 U.S.C. 1011-1015)	1, 4, 5, 8
Section 1	10

Texts	
Administrative Procedure Act, Legislative History, Senate Document No. 248, 79th Congress, 2d Session, pages 206 and 265	11
House Committee Report, May 3, 1946	11
Senate Committee Report, November 19, 1945	11

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vs.	
James F. Crafts,	*Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

The respondent James F. Crafts believes that the decision of the Court of Appeals for the Ninth Circuit is correct and sees no reason for a writ of certiorari in this matter.

QUESTIONS PRESENTED.

This case involves Public Law 15, 79th Congress (59 Stat. 33, 15 U.S.C. 1011-1015) sometimes called the "Mc-

Carran Act" or the "McCarran-Ferguson Act", which says that the Federal Trade Commission Act is applicable to the business of insurance "to the extent that such business is not regulated by State law."

Query: Does the Federal Trade Commission have jurisdiction over advertising of accident and health insurance in any state where such advertising is "regulated by State law"?

This case also involves Section 6(c) of the Administrative Procedure Act (60 Stat. 240, 5 U.S.C. 1005(c)) which says that an administrative subpena shall be sustained "to the extent that it is found to be in accordance with law."

Query: Should a District Court enforce a Federal Trade Commission subpena merely because the subpena was issued with proper formality, even if the Commission is exceeding the limit of its statutory authority?

STATEMENT OF CASE.

This case involves an attempt by the Federal Trade Commission to regulate the advertising of accident and health insurance by Fireman's Fund Indemnity Company, of which Mr. Crafts is president. Fireman's Fund is a California corporation licensed to and doing business in all 48 states, and the District of Columbia, (R. 36). The Commission claims the right to regulate advertising used by Fireman's Fund in the District of Columbia and in every state except California. The Commission excludes California on the theory that the Commission

has no jurisdiction in California over a California company. However, despite the fact that the Commission's right to regulate the business of insurance is limited "to the extent that such business is not regulated by State law," the Commission contends that it can regulate advertising used by Fireman's Fund in any state other than California regardless of regulation by local State law, and may regulate advertising used in California by any company organized outside of California even though such company is regulated in California by California law.

The subpena served on Mr. Crafts would require him to testify regarding, and to produce evidence of, the company's accident and health insurance in all 48 states and the District of Columbia (R. 20-23). The Commission, on a motion to quash, limited the subpena by excluding California. However, the order of the District Court enforcing the subpena was not so limited, and includes California.

The subpena was not issued as a part of any investigatory proceeding, but instead is a part of an adjudicative proceeding commenced by the issuance and service of a formal complaint under the Commission's Rules of Practice for Adjudicative Proceedings. This complaint makes specific charges against Fireman's Fund (which the company denies), gives notice of hearing, and sets forth a form of regulatory order which the Commission would issue in the event of no contest by the Company (R. 8-20).

Mr. Crafts appeared at the hearing, was sworn and identified himself (R. 33-34). Mr. Crafts respectfully

refused to answer further on the grounds the Commission had no jurisdiction (R. 42-43) and counsel for Fireman's Fund stated that the refusal was based upon the belief that the Federal Trade Commission had no jurisdiction to regulate advertising of accident and health insurance and therefore no jurisdiction to conduct the proceeding or to issue the subpena (R. 34-38). The Commission filed an application with the District Court to enforce the subpena (R. 3-7) and the District Court did so (R. 46-47), refusing to consider the question of jurisdiction (R. 70-71). Enforcement was stayed, pending the appeal (R. 97) and upon appeal the Ninth Circuit reversed, pointing out that this is a case of "jurisdiction" as a matter of law and not a case where "coverage" might depend upon the very facts sought by the subpena.

Advertising of accident and health insurance is regulated everywhere by "State law." Most of the states have a so-called "Model Act" which was suggested by the National Association of Insurance Commissioners during the three year moratorium which Public Law 15 provided for the purpose of allowing the States to adopt their own legislation. The other States and the District of Columbia have similar statutes, all of which prohibit false advertising. It seems obvious that whether advertising in a particular state is regulated by "State law" is a matter of judicial notice and does not depend upon any facts which could be elicited by testimony from Mr. Crafts or from the documents required by the subpena.

The Ninth Circuit did not attempt to analyse the laws of each of the 48 states and of the District of Columbia, but did point out the distinct purpose of Congress em-

phatically set forth in Public Law 15 "to abandon the field of regulation to the states where the power traditionally lay." (Petition 32). The Ninth Circuit then went on to say that the subpena in this case, calling for evidence of activities everywhere without segregation of the items, if any, over which the Federal Trade Commission might have jurisdiction, was too broad properly to present the question to the District Court (Petition 33). It pointed out the obvious fact that the Federal Trade Commission could have presented the question of its power by particularizing the demand. The subpena did not do so, and therefore the Ninth Circuit reversed and ordered the proceedings below dismissed.

The petition suggests, at page 7, that a subpena calling for advertising, insurance policies, contracts, agreements, correspondence, records and books of account in connection with accident and health insurance in all 48 states and the District of Columbia for the years 1953, 1954 and most of 1955 is not "burdensome". The Petitioner attempts to support this suggestion by stating that Respondent had all the material in the hearing room in two brief cases. This is a misstatement. Counsel for respondent did have brief cases in the hearing room which he stated contained the "available" material (R. 34). The writer of the petition for certiorari misconstrues the word "available". It does not mean "all" the records, but merely those records which were available in San Francisco at that time.

ARGUMENT.

The Commission concedes (as it must) that lack of lawful purpose is an appropriate defense to a proceeding to enforce an administrative subpena (Petition 7). The Commission attempts to avoid this basic legal principle by saying the Federal Trade Commission Act is applicable to the business of insurance "under some circumstances," but the Commission does not say "what circumstances" might apply to the present case.

The same contention was used in an attempt to support the subpena in *Jones v. Securities and Exchange Commission*, 298 U.S. 1. The Securities and Exchange Commission argued that the order enforcing the subpena "may rest upon the general power to conduct investigations" (298 U.S. 25). The Court rejected this argument and quashed the subpena, pointing out the S.E.C. had no jurisdiction over the particular proceeding in which the subpena had been issued. The same contention was necessarily rejected in *United States v. Minker*, 350 U.S. 179. Immigration officials have general power to conduct investigations but the subpenas were quashed when the officials attempted to exceed their authority in a particular case.

Petitioner also attempts to avoid this basic legal principle by saying we have a question of "coverage" and suggests that the Federal Courts must enforce such an administrative subpena regardless. There are two answers to this argument.

Federal Courts do not enforce administrative subpenas "regardless". Even the cases which Petitioner cites did not do this. In *Endicott-Johnson Corp. v. Perkins*, 317

U.S. 501, the Court considered the "lawful purpose" of the inquiry (317 U.S. 509). And in *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, the court pointed out, at page 216, that Mr. Walling, the administrator, must not act "in excess of his statutory authority."

The second answer is that the present case does not involve "coverage" as a question of fact, but "jurisdiction", as a matter of law. In *Endicott-Johnson Corp. v. Perkins,* supra, agency authority depended upon the very facts sought by the subpena, i.e., whether certain employees worked on a government contract or on a private contract. Similar factual questions underlie all of the so-called "coverage" cases. In the present case the Federal Trade Commission Act is applicable to the business of insurance only "to the extent such business is not regulated by State law." Federal Courts take judicial notice of state statutes. Jurisdiction of the Commission to regulate advertising of accident and health insurance is purely a matter of law depending on state statutes, and does not involve any question of fact.

It was suggested by the District Court in the present case that Section 6(c) of the Administrative Procedure Act precludes judicial consideration of jurisdiction in an application to enforce an administrative subpena. However, the Administrative Procedure Act did not remove the constitutional limitation on agency action. Instead, as Mr. Justice Jackson said in *United States v. Morton Salt Co.,* 338 U.S. 632, 644:

> "The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators

> whose zeal might otherwise have carried them to excesses not contemplated in the legislation creating their offices. It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights."

The Court of Appeals for the Ninth Circuit, in our opinion, correctly held that an attempt to enforce an administrative subpena presents a justiciable case or controversy in which courts act as courts and not as mere adjuncts of administrative agencies. This is particularly true when (as here) jurisdiction is a matter of law and not a question of fact.

Civil Aeronautics Board v. Hermann, 353 U.S. 322, reversing *per curiam* 237 F. 2d 359 (C.A. 9), cited on page 7 of the Petition, has no bearing on any of the issues in the present case. It involved the relevancy of documents to the issues of the Board's complaint. The present case involves jurisdiction to conduct the proceeding at all. There is no similarity between the two cases.

THERE IS NO CONFLICT OF DECISION.

Each case which has considered Public Law 15 has said that the Congress meant to permit state control of the business of insurance. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 upheld Public Law 15 as the basis for a state tax which discriminated against interstate commerce. *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 413, said that the "exclusive purpose" of Public Law 15 was to counteract any adverse effect which the decision

in *United States v. South-Eastern Underwriters Association,* 328 U.S. 533, "might be found to have on State regulation of insurance." *Wilburn Boat Co. v. Fireman's Fund Insurance Co.,* 348 U.S. 310, 319 said, the McCarran Act "was designed to assure that existing state power to regulate insurance would continue." In *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange,* 181 F. 2d 174, 176, the Court of Appeals for the Eighth Circuit said, "The purpose of the McCarran Act was to permit the states to continue the regulation of the business of insurance, unhampered, to the extent provided by the Act, by federal legislation relating to interstate commerce." In *United States v. Sylvanus,* 192 F. 2d 96, 100, the Court of Appeals for the Seventh Circuit said, "It is clear, we think that by this legislation, the Congress established a public policy upon the part of the national government to refrain from interference with the regulation and taxation of insurance companies by the several states."

In the field of advertising of accident and health insurance there have been three (and only three) Court of Appeals decisions, all three of them against the Federal Trade Commission. The Court of Appeals for the Ninth Circuit, in the present case, points out that limitation upon the power of the Commission "is beyond all doubt" (Petition 30). The Court of Appeals for the Fifth Circuit in *The American Hospital and Life Insurance Company v. Federal Trade Commission,* 243 F. 2d 719, decided April 9, 1957, involving advertising in fourteen states which have the so-called "Model Act", held that the Commission "was without jurisdiction". The Court of

Appeals for the Sixth Circuit, in *National Casualty Company v. Federal Trade Commission,* ..... F. 2d ....., decided June 6, 1957, agreed and went on to say that the Commission was without jurisdiction to regulate the business of insurance "in those states where such business is regulated by State law." Admittedly the *National Casualty* case was remanded to the Commission "for further proceedings consistent with this opinion." The Commission, in order to be consistent with the opinion, must at least admit no jurisdiction in the states which have the so-called "Model Act" and, as we said before, all other states have statutes in one form or another regulating advertising of accident and health insurance.

IMPORTANCE OF THE QUESTION.

Petitioner suggests that the enforcement of the subpena issued by the Commission in a proceeding against an insurance company is a matter of major importance and argues that if the decision in the present case is allowed to stand it might encourage resistance to subpenas in the cases pending against other insurance companies. If the Commission has no jurisdiction to regulate the advertising of accident and health insurance in those states where such advertising is regulated by State law, the Commission should not complain about resistance to subpenas issued in excess of authority.

It is more important to reassert the statement of the Congress "that the continued regulation and taxation by the several States of the business of insurance is in the public interest" (Section 1, Public Law 15, 79th Con-

gress). It is also important to affirm Section 6(c) of the Administrative Procedure Act as a "statutory limitation upon the issuance or enforcement of subpenas in excess of agency authority or jurisdiction" (Senate Committee Report, Nov. 19, 1945; House Committee Report, May 3, 1946. Administrative Procedure Act, Legislative History, Senate Document No. 248, 79th Congress, 2d Session, pages 206 and 265).

CONCLUSION.

The decision below is in accord with the decisions which have considered Public Law 15. It is also in accord with the decisions which have quashed administrative subpenas issued in excess of agency authority or jurisdiction. Under these circumstances, we see no reason for certiorari.

Petitioner, as we pointed out before, concedes that lack of lawful purpose is an appropriate defense to an application to enforce an administrative subpena. Yet, on page 10, Petitioner requests this Court to preclude consideration of this defense in the present case by suggesting that the judgment below be reversed "without further briefs or argument." If Public Law 15 means what it says, the Commission cannot regulate advertising of accident and health insurance already regulated by State law. If such advertising is regulated everywhere by State law, as we contend, the Commission has no statutory authority to regulate it anywhere. Denial of certiorari will assure judicial consideration of this appro-

priate defense before any subpena is enforced by the District Court in the present case.

Dated, August 26, 1957.

Respectfully submitted,

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No. 229

FEDERAL TRADE COMMISSION, *Petitioner,*

vs.

JAMES F. CRAFTS, *Respondent.*

PETITION FOR REHEARING.

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Subject Index

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	3
Statement	3
Reasons for granting a rehearing	4
Argument	6
Conclusion	15

Cases

	Pages
Endicott-Johnson Corp. v. Perkins, 317 U.S. 501	4, 6, 7, 8
Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186	4, 6, 7, 8
Pickett v. Union Terminal Company, 314 U.S. 704	6
Prudential Insurance Co. v. Benjamin, 328 U.S. 408	2
Tobin v. Banks and Rumbaugh, 201 F.2d 223 (C.A. 5), cert. den., 345 U.S. 942	8
United States v. Morton Salt Company, 338 U.S. 632	3
United States v. South-Eastern Underwriters Association, 322 U.S. 533	2
Universal Camera Corporation v. National Labor Relations Board, 340 U.S. 474	7

Statutes

Administrative Procedure Act, Sec. 6(c) (60 Stat. 240, 5 U.S.C. 1005(c))	3, 5, 7, 8, 11, 13, 14, 15
Public Law 15, 79th Congress (McCarran-Ferguson Act)	2, 4, 12, 13, 14, 15
Public Law 15, 79th Congress, Section 2 (59 Stat. 34, amended, 61 Stat. 448, 15 U.S.C. 1012)	3
28 U.S.C. 1254(1)	2

Rules

Rules of the United States Supreme Court:	
Rule 58, paragraph 1	1

Legislative Reports

94 Congressional Record No. 11, p. A 3214	13
Senate Document No. 248, 79th Congress, 2nd Session:	
Page 28	8, 9, 12
Page 206	10
Page 241	9
Page 363	11
Page 265	10, 12, 13

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No. 229

FEDERAL TRADE COMMISSION,
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JAMES F. CRAFTS,
Respondent.

PETITION FOR REHEARING.

JAMES F. CRAFTS, respondent in the above case, petitions for a rehearing of the summary decision of this Court entered on October 14, 1957. The petition is filed pursuant to paragraph 1 of Rule 58. It is a petition for rehearing from the per curiam reversal; not a petition for rehearing from the order granting certiorari.

OPINIONS BELOW.

The District Court did not issue a written opinion but the entire colloquy between court and counsel appears in

the printed record at pages 62-97. The opinion of the Court of Appeals is now reported at 244 F.2d 882.

JURISDICTION.

This Court took jurisdiction under 28 U.S.C. 1254(1).

QUESTION PRESENTED.

Public Law 15, 79th Congress (sometimes called the "McCarran Act" or the "McCarran-Ferguson Act") provides that the Federal Trade Commission Act shall be applicable to the business of insurance only "to the extent that such business is not regulated by State law." The question presented is whether, in view of Section 6(c) of the Administrative Procedure Act, a district court may determine in a subpena enforcement proceeding if Public Law 15 has divested the Federal Trade Commission of authority and jurisdiction over practices in the insurance business which are already regulated by State law.

The Court will recall that Public Law 15 is the aftermath of *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, and that the Congressional purpose "was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." (*Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 429.)

STATUTES INVOLVED.

Section 6(c) of the Administrative Procedure Act (60 Stat. 240, 5 U.S.C. 1005(c)) provides, in part:

> "Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law • • •."[1]

Section 2 of Public Law 15, 79th Congress (59 Stat. 34, as amended, 61 Stat. 448, 15 U.S.C. 1012, provides in part:

> "Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) • • • That after June 30, 1948 • • • the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."[2]

STATEMENT.

On May 11, 1955 the Federal Trade Commission issued a complaint against Fireman's Fund Indemnity Company seeking to regulate advertising used by Fireman's Fund

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[1]The Federal Trade Commission Act and the Commission's enforcement procedures are subject to the Administrative Procedure Act as held in *United States v. Morton Salt Company*, 338 U.S. 632.

[2]The purpose of the date, June 30, 1948, was to provide a three-year moratorium within which the several States could enact suitable regulatory statutes.

in connection with the sale of accident and health insurance policies (R. 8-20). Fireman's Fund answered (R. 52-62) and Mr. Crafts, its President, was subpenaed to testify at the hearing and to produce certain books and records (R. 20-23). Mr. Crafts appeared at the hearing but refused to testify or to produce any records on the ground that, under Public Law 15, the Federal Trade Commission had no jurisdiction over insurance advertising already regulated by State law (R. 33-38).

The Commission applied to the District Court for the Northern District of California for an order enforcing the subpena, and the order was issued without consideration of the jurisdictional issue (R. 46-47). On appeal the Court of Appeals held that the jurisdiction of the Commission had been substantially limited by Public Law 15 and that the District Court should have considered the issue (244 F.2d at 891). However, since the Court deemed the subpena so broad that the issue was not properly presented for decision, it ordered the proceeding dismissed (244 F.2d at 895). The Solicitor General and the Commission then petitioned this Court for a writ of certiorari and, on October 14, 1957, this Court granted certiorari and summarily reversed the decision of the Court of Appeals, citing *Endicott-Johnson Corp. v. Perkins*, 317 U.S. 501, and *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186.

REASONS FOR GRANTING A REHEARING.

We recognize the statistical odds against a rehearing but we believe there are cogent reasons for a rehearing

of the per curiam reversal in this case. The summary decision based upon cases decided prior to the Administrative Procedure Act appears to conflict with the unequivocal Congressional policy as set forth both in the language and in the extensive legislative background of Section 6(c) of the Act.

Further, two related cases are now pending on petitions for certiorari presenting the direct questions of whether and to what extent Public Law 15 has divested the Federal Trade Commission of authority to regulate insurance advertising already regulated by State Law. These cases are *Federal Trade Commission v. National Casualty Company,* October Term 1957, No. 435, and *Federal Trade Commission v. The American Hospital and Life Insurance Company,* October Term 1957, No. 436.[3] Since the effect of Section 6(c) of the Administrative Procedure Act was not mentioned in the Government's petition for certiorari in the present case nor in the per curiam opinion and since the issue in the present case will

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[3]Although the issue of the effect of Public Law 15 is presented in most of its aspects in Nos. 435 and 436, certain peculiarities of California law (under which Fireman's Fund is incorporated) present special problems in the application of Public Law 15. California has not adopted the so-called "Model Act" proposed by the National Association of Insurance Commissioners to satisfy the state regulation requirement of Public Law 15. However, California has a broad statute regulating insurance advertising which has been construed by the Insurance Commissioner and Attorney General of California as covering advertising used by California insurance companies both within and without the State. Fireman's Fund therefore has taken the position that its advertising is regulated everywhere by California law, and is not subject to Federal Trade Commission regulation without regard to the existence of regulatory statutes in other states. We believe that briefs and argument on this matter would be of assistance to the Court if certiorari should be granted in these other cases.

be controlled or at least affected by the disposition of the other two cases mentioned above, we believe that the Court may well consider it appropriate to grant this petition for rehearing so that all three cases can be considered together (*Cf. Pickett v. Union Terminal Company*, 314 U.S. 704).

ARGUMENT.

It has been Fireman's Fund's position throughout the proceeding that the issue presented is not one of "coverage" within the rationale of *Endicott-Johnson Corp. v. Perkins*, supra, and *Oklahoma Press v. Walling*, supra. We have contended that the statutory authority (or "jurisdiction") of the Federal Trade Commission, as limited by Public Law 15, does not permit the filing of a complaint attempting to regulate transactions in the business of insurance which are already regulated by State law, or permit the issuance of a subpena requiring the production of evidence regarding such transactions. It is our view that the issue thus presented is one of irrelevancy "to any lawful purpose" of the Commission (317 U.S. at 509) or of acts "in excess of [the Commission's] statutory authority" (327 U.S. at 216), and accordingly we have argued, and the Court of Appeals held (244 F.2d at 891) that the coverage cases are distinguishable.

In view of this Court's per curiam disposition of the case, we shall not now reargue the possible differences between "coverage" and "jurisdiction". We take the Court's decision to mean that the issue presented to the courts below, however denominated, seems to be within

Endicott-Johnson and *Oklahoma Press* and is therefore the type of issue which under these cases was to be left to administrative determination in the first instance. But the Administrative Procedure Act was adopted since the decisions in those cases, and Section 6(c) of the Act apparently was intended to affect their scope. The situation is not unlike *Universal Camera Corporation v. National Labor Relations Board*, 340 U.S. 474, where the Court considered the effect of the Administrative Procedure Act and recognized a change in the duty of Courts of Appeal when called upon to review orders of the National Labor Relations Board. The opinion discusses the legislative history and points out that Congress expressed a "mood" by oratory and by legislation—a mood which must be respected "even though it can only serve as a standard of judgment and not as a body of rigid rules assuring sameness of application." (340 U.S. at pp. 487-488.) We think Congress expressed a similar mood in Section 6(c) regarding judicial enforcement of administrative subpenas.

This Court has not previously considered Section 6(c). However, Section 6(c) recognizes the right to contest the enforcement of an administrative subpena and sets forth new standards for judicial enforcement by providing that upon such a contest the Court shall sustain the subpena "to the extent that it is found to be in accordance with law."

These new standards may not affect earlier decisions viewed in the light of factual situations under which they arose. But now Congress has been more specific in setting forth the duty of the district court when called upon